CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 274

HERBERT H. MAASS, AS SOLE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF IDA H. SAKS, DECEASED, PETITIONER,

vs.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

INDEX.

	PAGE
Statement Under Rule XIII	1
Summons	3
Complaint	4
Exhibit A, Claim for refund filed on or about April 10th, 1939	8
Exhibit B, Notice of rejection of claim for refund, dated May 3rd, 1939	11
Stipulation as to Complaint	12
Answer	13
Plaintiffs' Notice of Motion	15
Defendant's Notice of Cross-Motion	16
Opinion of Goddard, *D. J.*	17
Order Appealed From	24
Judgment Appealed From	25
Notice of Appeal	26
Stipulation as to Record	28
Clerk's Certificate	29
Opinions, Circuit Court of Appeals	31
Order for Mandate	39
Clerk's Certificate	41
Order allowing certiorari	42

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,
Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
Defendant-Appellee.

Statement Under Rule XIII.

This action was commenced by the service of the summons and complaint on or about the 19th day of May, 1939. Thereafter, the parties hereto, by their respective attorneys, entered into a stipulation dated the 14th day of July, 1939, amending the complaint in respect of certain clerical matters. Issue was joined by the service of the defendant's answer on or about the 16th day of September, 1939, and the subsequent filing thereof in the office of the Clerk of the Court.

This is an appeal from a judgment entered in the office of the Clerk of the United States District Court for the Southern District on the 9th day of November, 1939, in favor of the defendant and against the plaintiff, dismissing the plaintiffs' complaint and awarding judgment to the defendant in the sum of $20.00 costs. Said judgment was entered pursuant to the decision and opinion of the Honorable Henry W. Goddard dated the 27th day of October,

1939, and duly filed in the office of the Clerk of said District Court.

No trial was had, the said judgment having been rendered upon the cross motion of the defendant for judgment on the pleadings, consisting of the complaint, answer and stipulation aforesaid.

This appeal was taken by the filing of the notice of appeal in the office of the Clerk of the said District Court on the 10th day of November, 1939.

There has been no change in the names of the parties to this action as they are stated above.

The plaintiffs were represented by Maass & Davidson, their attorneys, and the defendant by John T. Cahill, United States Attorney for the Southern District of New York, and there has been no change of attorneys since the commencement of this action.

Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action.

File Number: Civ. 3-484.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,

Plaintiffs,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Defendant.

To the above-named Defendant:

You are hereby summoned and required to serve upon Maass & Davidson, plaintiffs' attorneys, whose address is 20 Exchange Place, New York City, an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CHARLES WEISER,
Clerk of the Court.

(Seal of the U. S. District Court)

Dated May 16, 1939.

Complaint.

10

[SAME TITLE.]

Plaintiffs, by Maass & Davidson, their attorneys, for their complaint herein, allege:

1. That on or about the 30th day of August, 1936, Ida H. Saks, who was then a resident of the Borough of Manhattan, City, County and State of New York, died leaving a Last Will and Testament which was thereafter
11 duly admitted to probate in the Surrogate's Court of the County and State of New York, and that letters testamentary were issued thereupon to the plaintiffs, who ever since then have been and still are the duly qualified and acting executors thereof.

2. That at all the times hereinafter mentioned the plaintiffs were and now are citizens of the United States and of the State of New York. That the plaintiff Joseph I. Saks resides at No. 14 West 86th Street, in the Borough of Manhattan, City, County and State of New York, and the plaintiff Herbert H. Maass resides at No. 888 Park Avenue, in the Borough of Manhattan, City, County and
12 State of New York.

3. On information and belief, that at all of the times hereinafter mentioned the defendant was and still is the duly appointed Collector of Internal Revenue for the Third District of New York, which is the district within which plaintiffs reside as aforesaid.

4. This is a suit of a civil nature arising under the Internal Revenue Laws of the United States.

5. That in pursuance of the laws and statutes of the United States the plaintiffs duly filed their return for Federal estate tax upon the estate of said decedent, and in such return exercised the option granted to them by the provisions of Section 302 of the Revenue Act of 1926, as amended by Section 404 of the Revenue Act of 1934 and Section 202 (a) of the Revenue Act of 1935, to have the value of all the property included therein on the date of the decedent's death determined as of the optional valuation date as therein provided. 13

6. That thereupon and pursuant to the provisions of Article 11 of Regulations 80, which were adopted by the Commissioner of Internal Revenue and which purport to interpret the laws and statutes pertaining to the assessment of Federal estate taxes, the Commissioner of Internal Revenue included in the amount of the decedent's estate determined to be taxable herein, the sum of $12,801.91, which said sum was not in fact property of the decedent belonging to her at the time of her death, but on the contrary represented income, to wit, rents, dividends and interest earned by and upon the property and assets of the estate subsequent to the date of death of said decedent. 14

7. That accordingly, having included the said sum of $12,801.91, as aforesaid, among the assets and property of the estate, the Commissioner of Internal Revenue determined that the amount of the gross estate was $791,063.42; the allowable deductions were $90,591.97; the net taxable estate was $700,471.45; and that the proper amount of said estate tax to be assessed against the said estate should be and was the sum of $63,666.49, and he thereupon duly assessed the said amount as the amount of Federal estate taxes payable by the said estate. 15

8. The plaintiffs paid to the defendant the sum of $58,304.44 on account of said tax on the 30th day of No-

16 vember, 1937, and the balance of $5,362.05, plus interest of $303.72 thereon, on the 28th day of November, 1938.

9. Upon information and belief, that the said Article 11 of Regulations 80 promulgated by the Commissioner of Internal Revenue, as aforesaid, was invalid and null and void in that the same was not and is not authorized or permitted by the provisions of law which it purports to interpret.

10. Upon information and belief, that the acts of the Commissioner of Internal Revenue in including in the taxable estate herein the aforesaid sum of $12,801.91 repre-
17 senting rents, dividends and interest earned by the property and assets of the estate subsequent to the date of death of the decedent were improper and not in pursuance of law.

11. That if the said sum of $12,801.91 had not been included in the amount of taxable estate the proper and correct amount of Federal estate tax payable by the said estate would have been only the sum of $59,931.88.

12. That on or about the 10th day of April, 1939, the plaintiffs duly filed their claim for refund, based upon the foregoing facts, in the said sum of $3,734.61 and interest,
18 a true copy of which said claim for refund is hereto annexed marked "Exhibit A".

13. That on the 3rd day of May, 1939, the Commissioner of Internal Revenue rejected the said claim for refund in its entirety, a true copy of the letter of rejection being hereto annexed and marked "Exhibit B", and neither the said amount of $3,734.61 and interest, nor any part thereof, has been refunded or repaid to the plaintiffs.

14. Upon information and belief, that by reason of the

premises the defendant has had and received money of the plaintiffs, has become indebted to the plaintiffs in the said sum of $3,734.61 plus $217.84 representing interest thereon to date of overpayment, aggregating $3,952.45, together with interest thereon from the 28th day of November, 1938, being the date of overpayment as aforesaid, as provided by law.

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of $3,952.45, with interest thereon from the 28th day of November, 1938 as provided by law, together with the costs and disbursements of this action.

MAASS & DAVIDSON,
Attorneys for Plaintiffs,
Office and P. O. Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

(Verified by Joseph I. Saks, one of the plaintiffs, on May 16, 1939.)

EXHIBIT A, ANNEXED TO COMPLAINT.

22

FORM 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June 1930

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

23

REFUND OF TAX ILLEGALLY COLLECTED.

REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

State of New York,
County of New York—ss.:

Name of taxpayer or purchaser of stamps Estate of Ida H. Saks, Deceased. Joseph I. Saks and Herbert
24 H. Maass, Executors.

Business address c/o Maass & Davidson, 20 Exchange Place, New York, N. Y.

Residence As above.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Third District, New York.

Exhibit A, Annexed to Complaint.

2. Period (if for income tax, make separate form for each taxable year) from , 19 , to , 19 . 25

3. Character of assessment or tax Federal estate tax.

4. Amount of assessment, $73,358.59; dates of payment 11/30/37—$58,304.44; 11/28/38—$5,362.05 and interest; balance of tax credited.

5. Date stamps were purchased from the Government

6. Amount to be refunded $3,734.61.

7. Amount to be abated (not applicable to income or estate taxes) $ 26

8. The time within which this claim may be legally filed expires, under Section 319(b) of the Revenue Act of 1926, on November 30, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

The gross estate determined herein was $791,063.42 and the allowable deductions, exclusive of specific exemption and exemptions for property taxed, were determined at $90,591.97. The estate elected to have the property constituting the gross estate valued at the optional valuation date, in accordance with Section 202(a) of the Revenue Act of 1935. Accordingly, the estate, in compliance with the provisions of Article 11, Regulations 80, but under protest, included, together with each item of the gross estate, the amount of income collected or otherwise accrued or realized upon the same between the date of death and the valuation date. Such items of income amounted to $12,801.91 with respect to the items of gross estate listed in Schedule B of the return herein, the further sum of $6,321.08 with respect to Item 33 of 27

Exhibit A, Annexed to Complaint.

Schedule I of the return, and the further sum of $833.33 with respect to Item 34 of said Schedule I. If, as the estate contends should have been done, all of said items of income had been excluded from the gross estate, the amount thereof would have been determined at $771,107.10, the deductions at $90,591.97 as before, the deduction on account of property previously taxed for the purposes of the computation under the Revenue Act of 1926 at $208,367.77, and the deduction on account of property previously taxed for the purpose of the computation under the Revenue Act of 1932 as amended at $229,903.87.

The foregoing revisions of computation would result in a reduced tax of $69,040.59, against which there would be allowable credit for taxes paid to the State of New York of $9,108.71, leaving the sum of $59,931.88 as the amount of tax payable herein after credit for taxes paid to the State of New York. The amount of tax heretofore paid herein is $63,666.49, thus resulting in an overpayment of $3,734.61, which is the amount of the refund hereby sought.

The estate submits that the items of income hereinbefore referred to constituted no part of the gross taxable estate, and that the provisions of Article 11, Regulations 80, are unauthorized, illegal and invalid.

The rights of the estate with respect to these items were fully reserved in the proceedings resulting in the determination of the tax heretofore assessed herein.

The return in connection with which this claim for refund is made was filed by Joseph I. Saks and Herbert H. Maass, Executors, who are still acting as such.

Signed ESTATE OF IDA H. SAKS, Deceased,
By HERBERT H. MAASS,
Executor.

(Sworn to and subscribed April 6, 1939.)

EXHIBIT B, ANNEXED TO COMPLAINT.

TREASURY DEPARTMENT

Washington

May 3 1939

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to
MT-ET-C1-8464-3d New York
Estate of Ida H. Saks
Date of death—September 30, 1936
Herbert H. Maass, et al., Executors,
c/o Maass & Davidson,
20 Exchange Place,
New York, New York.

Gentlemen:

The Bureau has examined the claim filed by you on April 10, 1939, on behalf of the above-named estate for refund of $3,734.61, Federal estate tax paid under the provisions of the Revenue Acts of 1926 and 1935.

In this case the executors elected to have the property included in the gross estate of this decedent valued in accordance with the method authorized by subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935. In the audit by the Bureau the values were determined in accordance with the above section and article 11 of Regulations 80, and dividends and interest that had accrued to the optional valuation dates were included in the gross estate.

The estate contends that accrued income, dividends and interest to the valuation dates should not have been included in the gross estate, that they constituted no part of the decedent's gross estate, and that the provisions of

34 article 11 of Regulations 80 are unauthorized, illegal and invalid.

The inclusion of dividends and interest that had accrued to the optional valuation dates is in accordance with article 11 (last paragraph beginning on page 38 of Regulations 80, 1937 Edition) which represents the Bureau's construction of the statute above referred to.

In view of the above and since there appears to be no overassessment of tax in this case, the claim for refund is rejected in its entirety.

Respectfully,

35 GUY T. HELVERING,
Commissioner.
By: D. S. BLISS

D. S. BLISS,
Deputy Commissioner.

Stipulation as to Complaint.

36 [SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the plaintiffs and John T. Cahill, Esq., United States Attorney, attorney for the defendant, that the complaint herein be, and the same hereby is, amended in the following respects:

In paragraphs 6, 7, 10 and 11, wherever there appears the figure "$12,801.91" the same shall be deemed amended to read as though it were "$19,956.32".

IT IS HEREBY FURTHER STIPULATED AND AGREED, that an order to the foregoing effect may, if necessary, be entered without notice. 37

Dated, New York, July 14, 1939.

MAASS & DAVIDSON,
Attorneys for Plaintiffs.

JOHN T. CAHILL,
United States Attorney,
Attorney for Defendant.

38

Answer.

[SAME TITLE.]

Joseph T. Higgins, Collector of Internal Revenue for the Third District of New York, defendant, by John T. Cahill, United States Attorney for the Southern District of New York, for his answer to the complaint of the above-named plaintiff:

39

1. Admits the allegations contained in paragraph numbered "7" of the complaint, except to allege that deductions, including the specific exemptions allowed under the Revenue Act of 1926, were allowed in the sum of $400,685.39, resulting in a net estate of $390,378.03 for tax imposed by the Revenue Act of 1926; deductions, including the specific exemption allowed under the Revenue Act of 1935, were allowed in the sum of $361,678.24, resulting in a net estate of $429,385.18 for tax imposed by the Revenue Act of 1935, and resulting in a total net tax of $73,358.59,

40 against which a credit was allowed in the amount of $9,692.10.

2. Denies each and every allegation contained in paragraphs numbered "9" and "14" of the complaint.

3. Denies each and every allegation contained in paragraph numbered "10" of the complaint, and alleges affirmatively that the sum of $19,956.32 representing rents, dividends and interest earned by the property and assets of the estate subsequent to the death of the decedent, were properly includible in the gross estate, in pursuance of the statute and the regulations pertaining thereto.

41

WHEREFORE, defendant prays that judgment be entered dismissing the complaint on the merits, and awarding the costs and disbursements of this action to the defendant.

Dated: New York, N. Y., September 16, 1939.

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
By: DAVID MCKIBBIN, 3RD,
Assistant United States Attorney,
Attorney for the Defendant,
Office & Post Office Address,
United States Court House, Foley Square,
Borough of Manhattan,
City of New York.

42

(Unverified.)

Plaintiffs' Notice of Motion.

[SAME TITLE.]

Sir:

PLEASE TAKE NOTICE that upon the pleadings herein, consisting of the complaint, the stipulation entered into between the attorneys for the respective parties hereto dated the 14th day of July, 1939 amending said complaint, and the answer of the defendant, copies of each of which are hereto annexed, the plaintiffs will move this Court, at a term thereof for the hearing of motions, to be held at the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 3rd day of October, 1939, at 10:30 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, for judgment on the pleadings in favor of the plaintiffs and against the defendant, for the relief demanded in the complaint, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., September 19, 1939.

Yours, etc.,

MAASS & DAVIDSON,
Attorneys for Plaintiffs,
Office and P. O. Address,
20 Exchange Place,
Borough of Manhattan,
New York, N. Y.

To:
JOHN T. CAHILL, ESQ.,
United States Attorney,
Attorney for Defendant,
United States Court House,
Office and P. O. Address,
Foley Square,
Borough of Manhattan,
New York, N. Y.

Defendant's Notice of Cross-Motion.

46

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that upon the pleadings herein, consisting of the complaint, the stipulation entered into between the attorneys for the respective parties hereto, dated the 14th day of July, 1939, amending said complaint, and the answer of the defendant, the defendant will move this Court at a term thereof for the hearing of motions to be held at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the
47 3rd day of October, 1939, at 10:30 o'clock A. M. of that day or as soon thereafter as counsel can be heard for a judgment on the pleadings in favor of the defendant and against the plaintiffs for the relief demanded in the answer and for such other and further relief as to the Court may seem equitable and just.

Dated, New York, N. Y., September 25, 1939.

Yours, etc.,

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Defendant,
48 Office & P. O. Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

MAASS & DAVIDSON, ESQS.,
Attorneys for Plaintiffs,
20 Exchange Place,
Borough of Manhattan,
New York, N. Y.

Opinion of Goddard, *D. J.*

49

[SAME TITLE.]

MAASS & DAVIDSON, Attorneys for Plaintiffs, by David J. Levy, of Counsel.

JOHN T. CAHILL, United States Attorney; by David McKibbin, 3rd, Assistant U. S. Attorney, of Counsel.

GODDARD, District Judge:

50

The case came on for hearing on motion of plaintiffs for judgment on the pleadings and the cross motion by the defendant for judgment in his favor. There is no dispute as to the facts and the sole issue of law presented is the validity of Article 11, Regulations 80 which was adopted by the Commissioner of Internal Revenue as an interpretation of Section 202a of the Revenue Act of 1935 (28 U. S. C. A. 411j). The entire case turns upon the point as to whether or not the regulation is in harmony with the Statute and is a reasonable exercise of the Commissioner's power to make rules and regulations for the enforcement of the Revenue Act. See Section 1101 of the Revenue Act of 1926 (26 U. S. C. A. 1691).

51

The pleadings show that plaintiffs are the duly appointed Executors of the Last Will and Testament of Ida H. Saks who died on August 30, 1936, a resident of New York City. As such Executors, they filed a Federal Estate Tax Return in which they elected, in accordance with Section 202a of the Revenue Act of 1935, to have the property of the estate valued for the purposes of the estate tax as of the "optional valuation date" rather than as of the date of the decedent's death. Section 202a of the Revenue Act of 1935 amends

52 Section 302 of the Revenue Act of 1926 so as to provide for such an election in the following manner:

> "If the executor so elects upon his return * * * the value of the gross estate shall be determined by valuing all the property included therein on the date of decedent's death as of the date one year after decedent's death, except that (I) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor * * * or sold, exchanged or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death * * *."

53

The obvious purpose of the section was to afford estates some relief from the hardships that might be imposed upon them if the estate tax had to be computed exclusively upon the basis of values existing on the date of the decedent's death. The Committee's reports show that Congress had in mind the situation faced by an executor who took office in a time of rapidly falling markets. In such situations, some executors found that their estates soon had
54 diminished to an amount barely sufficient to pay an estate tax based upon values which had existed only at the time of their decedent's death. This possible hardship the section sought to alleviate.

In this action the executors seek to recover from the Collector the amount which they paid under protest as estate tax upon the income received by the estate during the interim between the date of their decedent's death and the optional valuation date. Article 11, Regulations 80, requires such income to be included in the return. The theory underlying Article 11, Regulations 80, is that "all

the property included (in the gross estate) on the date of death * * *" must be interpreted as having a dual nature. Article 11, Regulations 80, relating to the Federal Estate Tax is lengthy but the pertinent part of it provides: 55

> "The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death." * * * 56
>
> "Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as 57

58 applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment."

* * * * * * * * *

59 "When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the
60 valuation date of the stock but payable subsequent thereto will not be so reflected if 'ex dividend' on valuation date of the stock, but is to be valued as of that date."

Plaintiffs argue that the option granted to estates by Section 202a of the Revenue Act of 1935 did not change the concept of "Gross Estate", and does not require that income earned and collected after the date of death shall be included therein. It is said that so far as Article 11, Regulations 80, attempts to tax such income it is unau-

thorized and void as an attempt to extend a law which 61
it purports to interpret.

At the outset it should be stated that although it is true that where an Act uses ambiguous terms or is of doubtful construction, a clarifying regulation or one indicating the method of an Act's application to specific cases is to be given weight by the courts, the interpretation of a statute always remains the function of the judiciary. The regulation cannot change what the Act originally meant. See *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U. S. 129; *Koshland* v. *Helvering,* 298 U. S. 441. Clearly, Article 11, Regulations 80, is an interpretative regulation and does 62
not lay down merely an administrative rule with respect to a matter of tax procedure. As such it can only be sustained if the Commissioner has interpreted the statute in a reasonable fashion.

In my judgment, the Commissioner has interpreted the statute in a reasonable manner and defendant's motion for a summary judgment should be granted. First, I think that it is reasonable to interpret the phrase "all the property included (in the gross estate) on the date of the decedent's death" as meaning all the principal and income rights included in the estate on the date of death. Certainly, even in the case in which the return is made on the basis of values as of the date of death and there is 63
no election, the valuation then made necessarily has to take into account both principal rights and income rights. Thus a bond must be returned at the price at which it was quoted upon the open market, plus all income accrued to date of death, even though the decedent would not have received that particular accrual unless he survived the payment date. This indicates that the "property" referred to in the Estate Tax Law has a dual nature and in view of the interests into which property is often divided, such

64 as life estates and remainders, no new theory is involved in this construction of the term.

Secondly, it is reasonable to measure the revaluation of the income rights included in the estate at the date of death by what was actually received as income during the option period. It must be remembered that the election does not have to be made until after the year has expired and so, at the time when it is made, the income actually earned during the year is a counterpart of what should be taken into consideration in appraising at the date of death the probable increase in the value of the income rights which were then included in the estate. Similarly, in the case of principal gains the amount actually realized
65 during the period is the measure for the purposes of revaluation. It may be noted that plaintiffs' argument to the effect that income earned after death cannot be considered to be a part of the property which is to be revalued, because it is not present in the estate at the time of death, is equally applicable to capital gains made by the estate after death. Like the income received during the year, these gains would not be taxed if the return was made upon the basis of date of death values. At the time of the decedent's death they, like the income, were only "property" included in the estate insofar as they were directly attributable to the principal rights which were
66 part of that property. Yet plaintiffs admit that such gains are taxable if the election is made.

Thirdly, as interpreted by the Commissioner, the statute is in harmony with the theory that the Estate Tax is an excise tax upon the power to pass property and is measured by what the decedent has at his disposal at the moment of his death. *New York Trust Co.* v. *Eisner,* 256 U. S. 345; *Schuette* v. *Bowers,* 40 Fed. (2nd) 208. In effect, what the statute says is that an executor may assume, if he so desires, that his decedent died a year later

than he actually did and the estate tax will then be levied as if the event upon which it is dependent had also happened at the later date. Thus to be consistent, everything that is found in the estate at the end of the year after death should be taxed even though part of what is then in the estate originally may have been income. 67

It has also been argued that the Commissioner's interpretation of the statute results in a taxation of the income received during the option period by both the Income and the Estate Tax Laws and that the court should, if possible, avoid an interpretation which results in a double taxation. See *Bull* v. *United States*, 295 U. S. 247; *United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189. But this rule is not applicable to the case at bar. First, whatever double taxation there is, it results primarily from an election made by the executor. Secondly, even if the statute were interpreted so as to exclude income earned during the option period from the estate tax, the statute would still result in a double taxation. The capital gains made during the year would be both income and part of the gross estate. Thirdly, there is such a double taxation even where there is no election. For example, if right after a death it is found that a decedent's bank account contains a large sum of cash that he has but recently received from his various securities and for which his executors must satisfy his income tax liability, this sum is also included in his estate and is subject to the estate tax along with everything else that belongs to him at the moment that he dies. 68 69

In view of the fact that there has been no reported litigation with respect to Article 11, Regulations 80, I do not think that Congressional re-enactment of the Estate Tax Law, including Section 202a of the Revenue Act of 1935, can be characterized as an indication of that body's approval of the regulation adopted by the Commissioner with respect to the section. But for the reasons which I have

70 set forth, it is my opinion that the regulation is a reasonable interpretation of the statute and defendant's motion is therefore granted.

October 27, 1939.

HENRY W. GODDARD,
U. S. D. J.

Order Appealed From.

At a Stated Term of the United States District Court, held in and for the Southern District of
71 New York, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 2nd day of November, 1939.

Present—HONORABLE HENRY W. GODDARD,
United States District Judge.

[SAME TITLE.]

The motion for judgment on the pleadings made by the plaintiffs herein in the above entitled action, and the cross motion for judgment on the pleadings made by the defend-
72 ant herein, having come on to be heard before this Court on the 10th day of October, 1939, and after hearing Maass & Davidson, attorneys for the plaintiffs, by David J. Levy, of Counsel, and John T. Cahill, United States Attorney for the Southern District of New York, attorney for the defendant, by David McKibbin, Assistant United States Attorney, of Counsel, in support of the respective motions, and due deliberation having been had, and an opinion dated October 27, 1939 having been filed,

Now, on motion of John T. Cahill, United States Attorney for the Southern District of New York, it is

ORDERED, that the defendant's motion for judgment on 73
the pleadings be and the same hereby is granted and the plaintiffs' motion for judgment on the pleadings be and the same hereby is denied; and it is

FURTHER ORDERED, that the complaint be and the same hereby is dismissed upon the merits, and that the costs and disbursements of this action be awarded to the defendant, and that the defendant have judgment and execution therefor.

HENRY W. GODDARD,
U. S. D. J.

74

Judgment Appealed From.

[SAME TITLE.]

An order having been entered on the 3d day of November, 1939, granting the defendant's motion for judgment on the pleadings and denying the plaintiffs' motion for judgment on the pleadings, and directing that judgment be entered in favor of the defendant herein,

75

NOW, on motion of John T. Cahill, United States Attorney for the Southern District of New York, attorney for the defendant, it is

ORDERED AND ADJUDGED that judgment on the pleadings is hereby rendered in favor of the defendant, that the complaint herein be and is hereby dismissed upon the merits and that Joseph T. Higgins, Collector of Internal Revenue for the Third District of New York, defendant herein, recover of the plaintiffs, Joseph I. Saks, 14 West 86th Street, New York, N. Y. and Herbert H. Maass, 888

76 Park Avenue, New York, N. Y., as executors of the last will and testament of Ida H. Saks, deceased, the costs and disbursements of this action as taxed in the sum of $20 and that the defendant have execution therefor.

Dated: New York, N. Y., November 9th, 1939.

GEORGE J. H. FOLLMER,
Clerk.

NOTICE OF SETTLEMENT of the within judgment is hereby waived.

MAASS & DAVIDSON,
77 Attorneys for Plaintiffs.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 3-484.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, Deceased,
78 Plaintiffs,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
Defendant.

Sirs:

PLEASE TAKE NOTICE that Joseph I. Saks and Herbert H. Maass, as Executors of the Last Will and Testament

of Ida H. Saks, deceased, the above-named plaintiffs, hereby 79
appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment which was entered in this action by the United States District Court for the Southern District of New York on the 9th day of November, 1939, in favor of the defendant and against the plaintiffs herein, and from each and every part of said judgment.

Dated, New York, N. Y., November 10, 1939.

Yours, etc.,

MAASS & DAVIDSON,
Attorneys for Plaintiffs, 80
Office and P. O. Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

To:
JOHN T. CAHILL, ESQ.,
United States Attorney,
Attorney for Defendant,
U. S. Court House,
Foley Square,
Borough of Manhattan,
City of New York. 81

CLERK OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Stipulation as to Record.

82

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,
Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
83 Defendant-Appellee.

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED by and between the attorneys for the respective parties to this appeal that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter.

Dated, New York, N. Y., November , 1939.

MAASS & DAVIDSON,
Attorneys for Plaintiffs-Appellants.
84

JOHN T. CAHILL,
United States Attorney, Attorney for Defendant-Appellee.

Clerk's Certificate.

85

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,
Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
Defendant-Appellee. 86

United States of America,
Southern District of New York—ss.:

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled action, as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York 87
in the Southern District, this day of November, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the United States the one hundred and sixty-fourth.

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

Opinions, Circuit Court of Appeals.

91

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 283—October Term, 1939.

(Argued March 14, 1940 Decided April 8, 1940.)

JOSEPH I. SAKS and HERBERT H. MAASS, as executors of Ida H. Saks, deceased,

Appellants,

92

—against—

JOSEPH T. HIGGINS, Collector,

Appellee.

Appeal by the Plaintiffs from a Judgment upon the Pleadings of the District Court for the Southern District of New York, in an Action to Recover for Estate Taxes Unlawfully Collected.

93

Before—L. HAND, CHASE and CLARK, *Circuit Judges.*

HERBERT H. MAASS for the appellants.

DAVID MCKIBBEN, III, for the appellee.

ROLLIN BROWNE,

JAMES D. OUCHTERLONEY and

GEORGE CRAVEN, *amici curiae.*

94 L. HAND, *C. J.*:

The only question involved in this appeal is the validity of Article 11 of Treasury Regulations 80, implementing §202 (a) of the Revenue Act of 1935. The plaintiffs are executors, and in accordance with the privilege granted by §202 (a), they chose to value their testatrix's estate as of August 30, 1937, the first anniversary of her death. The case comes to us upon a judgment dismissing the complaint for insufficiency, which described the property erroneously taxed, merely as an income of "rents, dividends and interest", received by them within the year following their testatrix's death. The Commissioner added
95 this income to the gross estate and assessed the plaintiffs accordingly; they paid the whole tax, and are now suing to recover so much as was levied upon the addition. The question is whether the regulation was valid in treating income, subsequently received, as part of "the property included" in the gross estate "on the date of the decedent's death."

The answer is not necessarily the same for all kinds of income. For example, an interest bearing bond is a series of promises to pay installments of money in the future. Part of these we call interest because we are accustomed to regard them as consideration for the obligee's forbearance; the rest we call principal because they restore the
96 original sum advanced. They are separate obligations—so far separate, indeed, that the obligee may bring successive actions upon them—but for convenience we group them together as a single piece or property, and they pass from hand to hand as such. The value of the bond is the aggregate value of all, each promise being discounted for the interval before its performance is due as well as for any doubts of the obligor's responsibility; and it follows that if the holder of such a bond dies, and some of the promises fall due within a year, the aggregate will be

pro tanto the smaller. If we appraise them then, we 97
shall be appraising less "property" than the holder possessed at death. This would at once be admitted as to part payments of principal, and interest is no different. It is payable, regardless of what the loan may have earned for the borrower; and although to the lender the payments may appear to be the produce of his principal, it is not so; he gets it not because anything comes out of the money lent, but merely because a future dollar payable by another is less desirable than a present dollar in hand. His right to interest dates from the beginning. Similarly, in the case of any other series of promises, like a lease, the performance of any one or more of them actually changes the 98
original property, even though we continue to speak of the whole series as though it were the same. Indeed, since the series does not include any promise to repay principal, a lease is ever more plainly a wasting piece of property. For these reasons we think that as to all transactions of this kind it was permissible to read the word, "property", in §202 (a) distributively; that is, as referring to an aggregate of obligations which changes with time. When a statute is open to fair differences of construction an administrative interpretation is often highly persuasive. *Koshland* v. *Helvering*, 298 U. S. 441, 446; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 329, 330, 331; *Bowen* v. *Johnston*, 306 U. S. 19, 29, 30; *Lynch* v. *Tilden* 99
Co., 265 U. S. 315, 322, 331; *U. S.* v. *Johnston*, 124 U. S. 236, 253.

The case is, however, otherwise as to dividends. Strictly we should not speak of these as separable from their shares until, by being declared, they become a debt of the company. For this reason, although what we have just said about interest applies truly enough to dividends already declared at the time of the decedent's death, a strong argument can be made for holding that as to others the regulation exceeded the statute. The reasons which here

100 lead us to a contrary conclusion are three: first, it will generally be true that dividends declared within the year have been in part accumulated at the beginning of the year; second, it is not likely that Congress should have meant to distinguish between dividends and interest, rents and the like; and third, the general purpose of the section seems to favor the Commissioner's interpretation. As for the first, while it is true that shareholders have no right to accumulated earnings until they are declared, except as they may insist upon the exercise of an honest judgment by their directors, it is equally true that collectively they are the beneficial owners of earnings, as of the other corporate assets. It would certainly not be unreasonable to suppose
101 that Congress might look upon shares which should be valued at the end of a year as separable from earnings already accumulated at the beginning. True, this would not go the whole length of the regulation, which made no distinction between dividends declared from accumulated earnings and others. Nevertheless, it is a consideration not without its weight, for the result of the plaintiff's construction is to allow accumulated earnings to escape taxation, except in so far as there may chance to be equal accumulations a year later.

This consideration would, however, scarcely have been enough, had the statute applied only to shares; in fact it
102 covered all kinds of property. It may be that, even so, the regulation included too much; we own it is a little hard to see how unplanted crops or unconceived offspring can be said to be part of the land or of the livestock of which a decedent dies possessed. But we are dealing with the income from investments, and the regulation need be valid only so far; and we think it unlikely that Congress should have distinguished between the different kinds of income from investments, especially as even that kind which by hypothesis is to be excepted (dividends) is itself subject to internal division between accumulated and unaccumulated

earnings. Practically, investors do not think of the income 103
from their securities as differing, because they have separately enforceable rights in the case of debts, leases, etc., and none in the case of shares of stock; they think of all as interchangeably income from investments. That does not of course determine on which side such income as a whole should fall (that is, whether it should all be treated as separable or as inseparable) but it does demand that a single disposition should be made of it; and the statute was not so plain as to forbid deciding for separability, whatever might have been the result, if shares of stock had alone been concerned.

Finally, the apparent purpose of the statute fortifies our 104
conclusion. The hardship which Congress meant to relieve was that, due to the inevitable delays of administration, legatees did not have a chance to realize the values at death from the securities of the estate, either for the payment of taxes, or for any other purpose. The actual values at that time were therefore illusory, and it was thought unfair to assess them upon what for them did not really exist. They were therefore allowed to substitute other values which they could in fact realize; the estate was to be taxed at what it was worth when it really became accessible. Surely that included not only the securities as they stood at the end of the year, but the income they had produced meanwhile. The plaintiffs wish, how- 105
ever, not only to disregard the inaccessible values, but a part of the accessible; and this they do through the fiction of relating back the values at the end of the year to its beginning, when they did not represent the value of anything whatever. There is not the least reason to suppose that Congress intended to give them that relief; nor does justice demand it. If they are not to be assessed upon what is practically beyond their reach, they should certainly be compelled to accept in its stead the total of what is practically within it. It is quite idle to invoke the

106 presumption against double taxation; the privilege is an option; if the taxpayers wish not to be subject to both estate and income taxes, they may always escape by accepting an assessment as of the time of death.

Judgment affirmed.

CHASE, *Circuit Judge* (dissenting):

As Section 202 (a) of the Revenue Act of 1935 but gave to executors an option, it is plain enough that Congress might impose such conditions upon its exercise as it saw fit.

But if Congress did intend to do what Article 11 of
107 T. R. 80 provides, and the majority has held the statute means, it chose a strange way to do it. Had that been the intention of Congress, it would have been easy to have said in plain words that that was one of the conditions attached to the option given. Because it did not do so but on the contrary simply provided that an executor might have the property in the estate at death valued as of a year later instead of taking the valuation as of the date of death, I think the ordinary distinction which is recognized throughout the income and estate taxing statutes between what is usually regarded as income as distinguished from principal was intended to be maintained.
108 It follows that I cannot accept the abstract reasoning of the regulation which the majority opinion approves as a permissible interpretation of a statute relating to taxation where the ordinary meaning of the language used is to be given effect.

Though intangibles are only one form of property involved, they will serve well enough for the purposes of illustration. They are, within common knowledge, bought and sold at prices which vary with the amount of accrued interest at the date of sale but not with interest to accrue in the future and it would probably seem strange to most

such sellers or purchasers to have the principal and the 109
so-called right to wholly unearned future interest valued separately as property. Unearned income from intangibles is generally treated as nothing but an expectancy which is merely an incident of the ownership of the intangibles themselves. Where there is an express promise to pay stated amounts of interest at stated times in the future there is always the express or implied understanding that the payment is compensation for withholding the principal from the owner for the time stated. When a bond, for instance, is valued as of any date, the rate of interest it bears is an important consideration. But if the concept of valuation now approved is right, then every bond alike 110
in every respect except the interest rate would be worth the same amount at any given time regardless of the interest rate and any variation in the price attributable to a differing earning power by way of interest would be reflected in a separate valuation of the right to receive interest to accrue in the future apart from the bond itself. The difficulty in respect to ordinary stock and the dividends which may or may not be declared seems even greater.

I do not suggest that such concepts of property are impossible but only that they are so unusual that they are too much to load upon the language of this statute. To make them even approach the realm of practical economic 111
reality in which taxation is to be kept and prevent unwarranted extension of a statute like this by implication, see *United States* v. *Merriam*, 263 U. S. 179, 187, one would have to believe that it was both feasible and customary in a business sense to purchase and sell the so-called property consisting of the right to receive in the future unearned interest or income from intangibles as something separate and distinct from the ownership of the intangibles themselves. And, what is of even greater significance, it would also be necessary to believe that Congress meant to legislate on

112 such a basis, rather than to say in simple words that, if the option offered was exercised, the estate income received by the executor during the year must be treated as though he had sold or otherwise disposed of property of a value equal to the amount of income received. And finally one must believe that Congress, without actually saying so, did intend to exact a price for the option made up in part by increasing the gross estate to the extent of gross income received during the year and to tax as property at the date of death not only the net income received but in effect the expense of getting it as well. I think Article 11 of T. R. 80 goes beyond a fair and reasonable interpretation of the statute and that it is consequently invalid. *Manhattan*
113 *General Equipment Co.* v. *Commissioner*, 297 U. S. 129.

114

Order for Mandate.

115

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of April one thousand nine hundred and forty.

Present—HON. LEARNED HAND,
HON. HARRIE B. CHASE,
HON. CHARLES E. CLARK,
Circuit Judges.

116

JOSEPH I. SAKS and HERBERT H. MAASS, as executors of Ida H. Saks, deceased,

Plaintiffs-Appellants,

v.

JOSEPH T. HIGGINS, Collector,

Defendant-Appellee.

117

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

Order for Mandate.

118 It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS.
Clerk.

(Back)

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

119

JOSEPH I. SAKS and HERBERT H. MAASS, as executors, etc.,

v.

JOSEPH T. HIGGINS, Collector.

ORDER FOR MANDATE

120

United States Circuit Court of Appeals
Second Circuit
Filed Apr. 24, 1940
D. E. Roberts, Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 40, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

JOSEPH I. SAKS and HERBERT H. MAASS, as executors of Ida H. Saks, deceased,

Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector,

Defendant-Appellee,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. ROBERTS,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1675)